

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STEVEN JOHN STOLTENBERG,

Defendant.

No. CR00-3021-MWB

**MEMORANDUM OPINION AND
ORDER REGARDING
MAGISTRATE’S REPORT AND
RECOMMENDATION CONCERNING
DEFENDANT’S MOTION TO
SUPPRESS, ORDER SETTING
EVIDENTIARY HEARING, AND
NEW TRIAL DATE**

TABLE OF CONTENTS

I. INTRODUCTION AND BACKGROUND	2
II. LEGAL ANALYSIS	4
A. Standard Of Review	4
B. Objections To Findings Of Fact	4
1. The Government’s First Factual Objection	4
2. The Government’s Second Factual Objection	6
3. The Government’s Third Factual Objection	7
4. The Government’s Fourth Factual Objection	8
5. The Government’s Fifth Factual Objection	9
6. The Government’s Sixth Factual Objection	9
7. The Government’s Seventh Factual Objection	9
C. Objections Regarding Conclusions Of Law	10
1. Standard Of Review For Probable Cause Determination	10
2. Analysis Of April 14, 1999, Search Warrant Application	13
a. piecemeal analysis	13
b. corroboration of anonymous sources	13
3. Search Of Backpack	16
4. Analysis Of Search Warrant Application For Gas Station	17

III. EVIDENTIARY HEARING AND NEW TRIAL DATE	18
IV. CONCLUSION	18

I. INTRODUCTION AND BACKGROUND

On June 14, 2000, a two-count indictment was returned against defendant Steven John Stoltenberg, charging him with possessing methamphetamine and cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841 (a)(1), 841 (b)(1)(B) and 841(b)(1)(C), and conspiring to distribute 500 or more grams of a substance or mixture containing methamphetamine, in violation of 21 U.S.C. § 846. On November 27, 2000, an eight-count superceding indictment was returned against defendant Steven John Stoltenberg, charging him with possessing methamphetamine and cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 841(b)(1)(C), conspiring to distribute 500 or more grams of a substance or mixture containing methamphetamine, in violation of 21 U.S.C. § 846, money laundering, in violation of 18 U.S.C. §§ 1956(a)(1)(B)(i), 1956(h), and 1957, and forfeiture of certain property, pursuant to 21 U.S.C. § 853(p).

On October 15, 2000, defendant Stoltenberg filed a motion to suppress (#19). In his motion, defendant Stoltenberg seeks to suppress evidence seized from his residence and business pursuant to four search warrants issued by an Iowa state magistrate.¹ He also

¹The first search warrant was issued on April 14, 1999, for the residence located at 313 Jefferson, Rockwell, Iowa. The second search warrant, also issued on April 14, 1999, (continued...)

seeks to suppress evidence found in a backpack that was seized from his place of business purportedly pursuant to a search incident to his arrest at that location. Defendant Stoltenberg's motion to suppress was referred to United States Magistrate Judge Paul A. Zoss, pursuant to 28 U.S.C. § 636(b), for the purpose of holding an evidentiary hearing and preparing a Report and Recommendation on the motion. On November 27, 2000, an evidentiary hearing was held regarding defendant Stoltenberg's motion to suppress. On December 27, 2000, Judge Zoss filed a Report and Recommendation in which he recommends that defendant Stoltenberg's motion to suppress be granted. After obtaining an extension of time, the government filed objections to Judge Zoss's Report and Recommendation on January 16, 2001. The court, therefore, undertakes the necessary review of Judge Zoss's recommended disposition of defendant Stoltenberg's motion to suppress.

The government has filed several factual objections to Judge Zoss's Report and Recommendation, as well as a number of objections to the legal conclusions reached by Judge Zoss in his Report and Recommendation.

¹(...continued)

was for the residence located at 507 Washington Road, Rockwell, Iowa. The second search warrant was necessitated because the first search warrant contained an incorrect address for defendant Stoltenberg's residence. The second search warrant was identical in all respects to the first search warrant, with the exception that the address of the residence that was authorized to be searched. The third search warrant, again issued on April 14, 1999, authorized the search of a black brief case located at defendant Stoltenberg's gas station in Rockwell, Iowa. The fourth search warrant was issued on June 19, 2000, for defendant Stoltenberg's gas station in Rockwell, Iowa.

II. LEGAL ANALYSIS

A. Standard Of Review

Pursuant to statute, this court's standard of review for a magistrate judge's report and recommendation is as follows:

A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). Similarly, Federal Rule of Civil Procedure 72(b) provides for review of a magistrate judge's report and recommendation on dispositive motions and prisoner petitions, where objections are made, as follows:

The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

FED. R. CIV. P. 72(b).

As noted above, the government has filed objections to Judge Zoss's Report and Recommendation. The court, therefore, undertakes the necessary review of Judge Zoss's recommended disposition of defendant Stoltenberg's motion.

B. Objections To Findings Of Fact

The court will address each of the government's factual objections seriatim.

1. The Government's First Factual Objection

First, the government objects to Judge Zoss's finding that the warrant application contained no information linking Stoltenberg to any of the controlled buys made from James

Johnson and “Hoover.” The record reveals no direct evidence linking Stoltenberg to any of the controlled buys made from Johnson and Hoover. Indeed, the only information contained in the initial search warrant application which purports to directly link Stoltenberg to Johnson’s drug activity is the “concerned citizen” information received in March of 1999:

5. A concerned citizen has contacted the North Central Iowa Narcotics Task Force office on numerous occasions to provide information regarding JOHNSON and STOLTENBERG. Within the past month, the caller has made several contacts with the Task Force to provide information concerning the drug association between JOHNSON and STOLTENBERG. Much of the information the caller had provided had been verified through investigative means. STOLTENBERG is the owner of the Amoco station in Rockwell. STOLTENBERG is driving a tan 1981 Lincoln Town car registered to ANN VANBLARICOM. According to Cerro Gordo County Deputy Thompson, VANBLARICOM is STOLTENBERG’s grandmother. The address on the registration is the same as STOLTENBERG’s. The caller indicated the most activity occurs between 3 and 4 p.m. when STOLTENBERG has other employees at the gas station to free him to leave. During the week of 4/11/99 the concerned citizen contacted Officer Tyler of the Task Force and indicated that STOLTENBERG had made a trip to the Sioux City area on Saturday, returning on Sunday.

Search Warrant Application, Lewis Affidavit at ¶ 5. It is obvious that the information contained in this paragraph provides no meaningful link between Johnson and defendant Stoltenberg other than the informant’s *ipse dixit* conclusion. The court notes that defendant Stoltenberg’s name was found in an electronic address book during the search of Johnson’s residence, yet this fact does not directly link Stoltenberg to any of the controlled buys made from Johnson and Hoover.

As evidence linking Johnson and defendant Stoltenberg, the government points to the fact that Johnson made a sale of methamphetamine two days after Ron Law was alleged to

have made a delivery of methamphetamine to defendant Stoltenberg. The flaw in the government's reasoning is that it begs the question and assumes that Stoltenberg received methamphetamine from Law and that Stoltenberg was Johnson's drug source. Therefore, this objection to Judge Zoss's Report and Recommendation is overruled.

2. The Government's Second Factual Objection

The government next objects to Judge Zoss's finding that "[a] review of the first affidavit and all the attachments to the first application does not reveal evidence to support the magistrate's conclusions set for on the Endorsement." Report and Recommendation at 6. Judge Zoss was critical of the search warrant's hand-written endorsement in which the Iowa state magistrate found:

Controlled buys at residence 110 S. Monroe, which are connected to this residence and person and vehicle are described and explained in the attachment. Recent information and purchase on this date. Recent travel and delivery activity on part of suspect and persons cooperating with him. Investigators have corroborated information from outside sources. See attachments to application.

Search Warrant Endorsement at ¶ 2.

The court finds Judge Zoss's criticism of the search warrant application's endorsement to be warranted. As discussed above, the court does not find a legitimate nexus to have been established between defendant Stoltenberg and the controlled buys of methamphetamine made from Johnson. The search warrant application is entirely devoid of information establishing that Stoltenberg's vehicle was at the residence at 110 S. Monroe. The search warrant application does contain information that the automobile used by defendant Stoltenberg was observed at Ron Law's residence in Lawton, Iowa. The search warrant application further provides information that an anonymous caller had indicated that on February 17, 1999, Law was en route to make a "delivery" to Stoltenberg. Law's arrival in Rockwell, Iowa, however, could not be verified by surveillance. Therefore, this

objection to Judge Zoss's Report and Recommendation is overruled.

3. *The Government's Third Factual Objection*

The government also objects to the absence of facts in the report and recommendation that are contained in the fourth search warrant application. The court notes that although the fourth search warrant application, the application for defendant Stoltenberg's gas station, Steve's Amoco, and defendant Stoltenberg's truck, was attached to defendant Stoltenberg's motion, it was not officially offered as an exhibit by either party at the evidentiary hearing. Judge Zoss noted this fact in his Report and Recommendation and indicated that he would nonetheless consider that document. The fourth search warrant application contains the affidavit of David W. Tyler, a Special Federal Officer of the Federal Bureau of Investigations. In addition to recounting information regarding the search of defendant Stoltenberg's residence, Officer Tyler avers that Stoltenberg has been arrested for drug offenses in the past. He also attests that on October 19, 1999, a confidential informant provided information that Stoltenberg sells large amounts of methamphetamine and that he sometimes keeps methamphetamine in a safe at the gas station. Officer Tyler asserts that this confidential informant is "of mature age" and has provided information in the past that had proved to be reliable and has resulted in arrests. Tyler Aff. at ¶ 6. Officer Tyler's affidavit goes on to allege that on November 22, 1999, an anonymous source reported that Stoltenberg was continuing to buy and sell methamphetamine and was "making a lot of money." Tyler Aff. at ¶ 7.² Therefore, this objection to Judge Zoss's Report and Recommendation is sustained part and overruled in part.

²The court notes that the government asserts in its objections to the report and recommendation that Officer Tyler's affidavit consists of nine unnumbered paragraphs. The only copy of Officer Tyler's affidavit of record is the one attached to defendant Stoltenberg's Motion To Suppress. That affidavit, however, consists of only six full paragraphs and a portion of a seventh. The court has considered only that portion of Officer Tyler's affidavit which has been attached to Stoltenberg's Motion To Suppress.

4. *The Government's Fourth Factual Objection*

The government's fourth factual objection is to Judge Zoss's making factual findings regarding the search of a backpack found in defendant Stoltenberg's office incident to his arrest. The government asserts that this issue was not properly raised in defendant Stoltenberg's moving papers and therefore the government was not prepared at the evidentiary hearing to present the testimony of the officer, Officer Tyler, who actually seized the backpack and conducted the search.

The court agrees that the issue of the backpack was not raised in defendant Stoltenberg's moving papers, but arose during the evidentiary hearing. Nonetheless, the government did not assert that it was unprepared to address that issue at that time or that it wished to present the testimony of Officer Tyler. Rather, the following exchange occurred:

THE COURT: Is that an issue in this case, whether that
 was a lawful search incident to arrest?

MR. VANDEN BERG: That would be our argument.

THE COURT: Is that an issue the government is going to
 present evidence on?

MR. WILLIAMS: I'll certainly put it on now. I wasn't
 aware that that was an allegation. I was
 aware that the search was being
 challenged as being fruit of the poisonous
 tree because in the application for the
 search in 2000, we cited back to the
 evidence we obtained in 1999. But I
 wasn't aware—I'll put Ms. Lewis back on
 the stand to address the matter.

Tr. at p. 41.

The government did not object to the issue being taken up at the evidentiary hearing

nor did it assert in a timely manner that it was unprepared to address the issue or that it wished to present additional evidence on the topic. The government's failure to take such actions may arguably constitute waiver. However, because defendant Stoltenberg did not raise the issue in his motion, he did not put the government on notice that the issue would be taken up at the evidentiary hearing. Therefore, the court will grant the government's request for an evidentiary hearing on this issue.

5. *The Government's Fifth Factual Objection*

The government's fifth factual objection is to a factual finding surrounding defendant Stoltenberg's arrest on June 19, 2000. The government concedes that Judge Zoss's factual finding that defendant Stoltenberg was not in his office at the time of his arrest is correct. The government asserts, however, that defendant Stoltenberg was standing near the doorway to his office at the time of his arrest. The record shows that defendant Stoltenberg exited his office when Agent Lewis arrived at the gas station and that defendant Stoltenberg was four to five feet from the door to his office when he was placed under arrest. Tr. at p. 43. Therefore, this objection to Judge Zoss's Report and Recommendation is overruled.

6. *The Government's Sixth Factual Objection*

The government also objects to Judge Zoss's finding that the arresting officers pushed defendant Stoltenberg down into a chair in the gas station. The court concludes that this finding is supported by the record. Defendant Stoltenberg testified that "[t]here was a chair right inside the —the door when you came into the station, and one of the officers, that's where he shoved me and he put me down." Tr. at 48. Therefore, this objection to Judge Zoss's Report and Recommendation is overruled.

7. *The Government's Seventh Factual Objection*

The government's seventh factual objection is to the absence of factual findings regarding information known by Agent Lewis at the time of the search of defendant Stoltenberg's residence but not included by her in her affidavit. The record shows that

while Agent Lewis knew that defendant Stoltenberg had prior criminal charges she did not know the dates of these charges. Tr. at p. 19. The record further shows that Agent Lewis had received intelligence information from unnamed sources regarding the location of defendant Stoltenberg's house. Tr. at p. 24. The directions Agent Lewis had to Stoltenberg's house did not match the address listed on defendant Stoltenberg's driver's license. Tr. at p. 25. Finally, the record shows that other individuals listed on Johnson's electronic notebook have had criminal investigations initiated against them and criminal charges brought. Tr. at 32. The criminal investigations of these individuals was not started as a result of getting their names from Johnson's electronic notebook. Tr. at p. 32. Therefore, this objection to Judge Zoss's Report and Recommendation is sustained.

C. Objections Regarding Conclusions Of Law

1. Standard Of Review For Probable Cause Determination

The government asserts that Judge Zoss employed an incorrect standard of review in reaching his conclusion that the search warrant for defendant Stoltenberg's house was invalid because probable cause was lacking. The seminal case of *Illinois v. Gates*, 462 U.S. 213 (1983), provides the standard an issuing court must follow in determining whether probable cause supports a search warrant application and, consequently, the duty of the reviewing court when considering the propriety of that determination:

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Id. at 238.

The question presented on review of an issuing judicial officer's determination is not whether the reviewing court would have issued the warrant based on the affidavit as

presented, but whether the court which did issue the warrant had a "'substantial basis for . . . conclud[ing]' that probable cause existed." *Id.* at 238-239 (citation omitted). Thus, a reviewing court does not conduct a de novo review of the issuing judge's determination, but must instead afford it great deference. *Id.* at 236. As the United States Supreme Court explained in *Gates*:

[W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts." [*Spinelli v. United States*, 393 U.S. 410, 419, 89 S. Ct. 584, 590, 21 L.Ed. 2d 637 (1969)]. "A grudging or negative attitude toward warrants," [*United States v. Ventresca*, 380 U.S. 102, 108, 85 S. Ct. 741, 745-46, 13 L.Ed. 2d 684 (1965)], is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; "courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner." *Id.*, at 109, 85 S. Ct. at 746.

Gates, 462 U.S. at 236; *see also United States v. Gladney*, 48 F.3d 309, 312 (8th Cir. 1995).

The Eighth Circuit Court of Appeals has weighed in on this topic as well, observing that:

Probable cause exists when "there are sufficient facts to justify the belief by a prudent person that contraband or evidence of a crime will be found in the place to be searched.

Gladney, 48 F.3d at 312 (quoting *United States v. Bieri*, 21 F.3d 811, 815 (8th Cir.1994)); *see also United States v. Wells*, 223 F.3d 835, 838 (8th Cir. 2000) ("The evidence as a whole must provide a substantial basis for a finding of probable cause to support the issuance of a search warrant."); *United States v. Johnson*, 219 F.3d 790, 790 (8th Cir. 2000) ("Probable cause means a fair probability that contraband or evidence of a crime will be found in a particular place given the circumstances set forth in the affidavit.") (quoting

United States v. Tellez, 217 F.3d 547 (8th Cir. 2000) (in turn quoting *United States v. Horn*, 187 F.3d 781 (8th Cir. 1999) (internal quotation marks omitted)). Equally on point is the observation of Justice (then Judge) Kennedy:

For probable cause to exist, a magistrate need not determine that the evidence sought is in fact on the premises to be searched, or that the evidence is more likely than not to be found where the search takes place. The magistrate need only conclude that it would be reasonable to seek the evidence in the place indicated in the affidavit.

United States v. Peacock, 761 F.2d 1313, 1315 (9th Cir. 1985), *cert. denied*, 474 U.S. 847 (1985) (emphasis added in part) (citations omitted). Where, as here, the issuing state magistrate relied solely on the affidavit presented to her, "'only that information which is found within the four corners of the affidavit may be considered in determining the existence of probable cause.'" *Gladney*, 48 F.3d at 312 (quoting *United States v. Leichtling*, 684 F.2d 553, 555 (8th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983)).

Upon review of the record and Judge Zoss's Report and Recommendation, the court concludes that Judge Zoss employed the correct, deferential, standard of review concerning the state magistrate's finding of probable cause. Although the government points to one portion of Judge Zoss's analysis as evidence that a *de novo* standard of review was employed, Judge Zoss clearly preceded that section by clearly setting out the correct standard of review within the text of his Report and Recommendation:

Thus, the scope of this court's review of the search warrants in this case is limited to a determination of whether the magistrate had a "substantial basis" to issue the warrants.

Report and Recommendation at p. 14. After conducting his analysis of the search warrants, Judge Zoss again incorporated the correct legal standard in his conclusion, finding that "[t]he court finds no substantial basis existed for issuance of the first two warrants. . . ." Report and Recommendation at p. 31. The court concludes that Judge Zoss employed the

correct standard of review concerning the state magistrate's finding of probable cause and this objection is overruled.

2. Analysis Of April 14, 1999, Search Warrant Application

The government objects to Judge Zoss's analysis of the warrant application on a number of grounds. The court will take up each ground raised by the government *seriatim*.

a. piecemeal analysis

The government asserts that Judge Zoss's legal analysis is faulty because he is alleged to have engaged in a piecemeal analysis of the affidavit in support of the search warrant. The court recognizes that the Eighth Circuit Court of Appeals has held that "punctilious paragraph-by-paragraph dissection of the supporting affidavit" is not the appropriate standard of review. *United States v. Townsley*, 843 F.2d 1070, 1076 (8th Cir. 1988); see *United States v. Leisure*, 844 F.3d 1347, 1354 (8th Cir. 1988) (declining to "undertake a piecemeal dismemberment of the various paragraphs of the affidavit without attention to its force as a whole."). Rather, the court acknowledges that a determination of probable cause depends on a reading of the affidavit as a whole. *Gates*, 462 U.S. at 237. Here, Judge Zoss considered not only the information contained in each individual paragraph, but the affidavit as a whole. Only by analyzing the individual pieces that make up the warrant may a court determine whether the search warrant application as a whole rises to the level of probable cause.

b. corroboration of anonymous sources

The government further argues that Judge Zoss's analysis was flawed because he incorrectly concluded that the informants did not corroborate each other and that their information was not corroborated by other sources. The government argues that the informant information contained in affidavit paragraph four is corroborated by the informant information contained in affidavit paragraph five. The court disagrees with this assertion. The "concerned citizen" informant in paragraph 4 disclosed that Stoltenberg was selling

large quantities of methamphetamine and that he stored the drugs and cash in a safe at his house. The informant further told authorities that Stoltenberg sometimes carried cash, drugs, and a scale in a duffel bag. It was further alleged that Stoltenberg received his drugs “from a source *in* Sioux City.” Lewis Affidavit A at ¶ 4 (emphasis added). The informant information contained in paragraph five does not mention the type of drugs Stoltenberg is alleged to have been distributing. No mention is made in paragraph five regarding the location of the drugs or any use of a duffel bag by defendant Stoltenberg. Rather, the “concerned citizen” informant in paragraph five “has made several contacts with the Task Force to provide information concerning the drug association between STOLTENBERG and JOHNSON.” Lewis Affidavit A at ¶ 5. Although Agent Lewis avers in paragraph five that much of this information had been verified, the only verified information noted in paragraph five is Stoltenberg’s business and the type of automobile Stoltenberg drives. These facts, however, are in the public domain, the mere verification of which provide no appreciable value in establishing the reliability of the witness.³ See *Franklin v. Duncan*, 884 F. Supp. 1435, 1455 (N.D. Cal.), *aff’d*, 70 F.3d 75 (9th Cir. 1995). The “concerned citizen” informant in paragraph five also disclosed that Stoltenberg was engaging in drug activity between the hours of 3 p.m. and 4 p.m. when his employees at his service station enable him to leave, and that Stoltenberg had made a trip to Sioux City, Iowa, on Saturday and returned on Sunday. Neither of these two facts are mentioned by the informant who supplied the information contained in paragraph four. Moreover, the informant who supplied the information contained in paragraph five does not allege Stoltenberg’s purpose for the trip to Sioux City.

The informant information supplied in paragraph six does little to buttress the

³This is particularly true in a Lake Wobegonian town such as Rockwell, Iowa, a small Iowa town with a population of only 1039.

credibility of the informant who supplied information in paragraphs four and five. The information provided in paragraph six was that Ron Law was en route from Lawton to Rockwell to make a “delivery” to Stoltenberg. This information, however, could not be verified. It is further alleged that Stoltenberg’s automobile has been observed at Law’s residence on several occasions. The informant who supplied the information contained in paragraph four asserted that Stoltenberg obtained his drugs “from a source *in* Sioux City,” Lewis Affidavit A at ¶ 4 (emphasis added), while the informant who supplied the information contained in paragraph six asserted that Stoltenberg obtained his drugs from Law who resides in Lawton, Iowa.⁴ Although Lawton is located in close proximity to Sioux City, it is clearly not in Sioux City. Thus, the credibility of the informant who supplied the information contained in paragraph four is not appreciably augmented by the information contained in paragraph six.

The court concludes upon a *de novo* review of the record that the state magistrate did not have a substantial basis for concluding that a search would uncover evidence of wrongdoing based on the information contained in the four corners of the April 14, 1999, search warrant application. See *United States v. Gibson*, 928 F.2d 250, 252 (8th Cir. 1991) (holding that probable cause was lacking in a case of a partially verified anonymous telephone call, where anonymous informant notified a police officer “that he or she had been inside the house on that day and had seen about \$30,000.00 in cash in several bank bags and three kilos of cocaine in and on a desk in the basement of the house,” because while noting the detail of the information provided by the anonymous caller, focused on the fact that “only several innocent details had been corroborated by the police in driving by the address given and by making a few telephone calls.”); *In re Young*, 716 F.2d 493, 501 (8th Cir.

⁴The court takes judicial notice of the fact that the town of Lawton, Iowa, is located 12 miles east of Sioux City, Iowa.

1983) (holding that search warrant application did not provide the issuing magistrate with a substantial basis to determine the presence of probable cause where the supporting affidavit did not give any of the underlying circumstances from which the anonymous source's conclusions were based); *see also United States v. Weaver*, 99 F.3d 1372, (6th Cir. 1998) (holding that "bare bones" affidavit failed to provide sufficient factual information for a finding of probable cause where affidavit contained a "paucity of particularized facts" indicating that a search would reveal evidence of wrongdoing); *United States v. Leake*, 998 F.2d 1359, (6th Cir. 1993) (holding that information received by police from anonymous informant stating that the person had been hired to do some work at an address where the anonymous informant smelled and observed what appeared to be marijuana stacked in the basement did not provide probable cause for issuance of search warrant where the anonymous informant gave no names or dates upon which he saw the marijuana and the police failed to provide corroborating information). The court finds that the affidavit, taken as a whole, consists of nothing more than a stringing together of what appear to be vague and unsupported suspicions, and threadbare conclusions. The court, therefore, overrules the government's objections as to Judge Zoss's analysis of the April 14, 1999, search warrant.

3. Search Of Backpack

The government also argues that the search of the back pack located in the office of defendant Stoltenberg's gas station was a proper search incident to arrest. As a general rule, a search conducted incident to a lawful arrest is valid under the Fourth Amendment. The justification for such warrantless searches is the need to secure any weapons and to prevent the concealment or destruction of evidence. *Chimel v. California*, 395 U.S. 752, 763 (1969). Under *Chimel*, the police may, incident to an arrest, search "the arrestee's person and the area 'within his immediate control.'" *Id.* at 763. The scope of the permissible search incident to an arrest has been explored in subsequent Supreme Court cases. *See, e.g.,*

United States v. Chadwick, 433 U.S. 1, 12-13 (1977) (search of footlocker not valid incident to arrest); *United States v. Robinson*, 414 U.S. 218, 235-36 (1973) (search of crumpled cigarette package valid incident to arrest).⁵

Because the court has granted the government's request for an evidentiary hearing regarding the search of the backpack found in defendant Stoltenberg's office incident to his arrest, the court will consider the evidence offered at that the evidentiary hearing before ruling on this portion of defendant Stoltenberg's motion.

4. Analysis Of Search Warrant Application For Gas Station

The government objects also to Judge Zoss's analysis of the warrant application for the gas station on the ground that the fourth search warrant application contained additional allegations of evidence not found in the first search warrant application. Because the court has found the search of defendant Stoltenberg's house to have been illegal, evidence obtained from the search of that structure may not form the basis for subsequent search warrants. Thus, the issue confronting the court is whether law enforcement had evidence from independent sources sufficient to support a finding of probable cause to search the gas station without reference to the results of the search of defendant Stoltenberg's home. As noted above, the government has failed to supply the court with a complete search warrant application for the gas station. The government will be permitted at the evidentiary hearing to remedy this defect by submitting a complete copy of the search warrant application for Stoltenberg's service station.

The court will delay its ruling regarding the validity of the search warrant for Stoltenberg's service station until after the evidentiary hearing is conducted. Similarly, the court will defer its ruling on the government's argument that the good faith exception outlined

⁵The court notes that in *Robinson* the Supreme Court was addressing a search of a person incident to an arrest, and not a search of the area within the person's immediate control. See *Robinson*, 414 U.S. at 234.

in *United States v. Leon*, 468 U.S. 897, 922-23 (1984), is applicable in this case.

III. EVIDENTIARY HEARING AND NEW TRIAL DATE

The court will conduct an evidentiary hearing, regarding the search of a back pack found in defendant Stoltenberg's office incident to his arrest, commencing on **Monday, February 5, 2001, at 3:00 p.m.** at the United States Courthouse, Sioux City, Iowa. Pursuant to the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, the court determines that the period of time from January 16, 2001, the date the government's request for an evidentiary hearing was filed, until the date of the court's ruling on defendant's motion to suppress, "shall be excluded . . . in computing the time within which the trial of any such offense must commence", pursuant to 18 U.S.C. § 3161(h)(1)(F) and § 3161(h)(1)(J). This time reflects the period necessary for the court to have held an evidentiary hearing on a portion of defendant Stoltenberg's motion to suppress and the subsequent period that that portion of the motion to suppress is under consideration as well as the remainder of Judge Zoss's report and recommendation is under advisement. The February 5, 2001, trial in this case is continued to **Monday, March 12, 2001 at 9:00 a.m. in Sioux City, Iowa.**

IV. CONCLUSION

The court initially concludes that upon a *de novo* review of the record that the state magistrate did not have a substantial basis for concluding that a search would uncover evidence of wrongdoing based on the information contained in the four corners of the April 14, 1999, search warrant application. The court, therefore, overrules the government's objections as to Judge Zoss's analysis of the April 14, 1999, search warrant, and accepts that portion of Judge Zoss's Report and Recommendation. The court grants the government's request for an evidentiary hearing on the issue of the legality of the search of a back pack found in defendant Stoltenberg's office incident to his arrest. The court will conduct an

evidentiary hearing, regarding the search of a back pack found in defendant Stoltenberg's office incident to his arrest, commencing on **Monday, February 5, 2001, at 3:00 p.m.** at the United States Courthouse, Sioux City, Iowa. The court will consider the evidence offered at the evidentiary hearing before ruling on the portion of defendant Stoltenberg's motion to suppress related to the back pack search as well as ruling on the validity of the search warrant for Stoltenberg's service station. The court will also defer its ruling on the government's argument that the *Leon* good faith exception is applicable in this case. The February 5, 2001, trial in this case is continued to **Monday, March 12, 2001 at 9:00 a.m. in Sioux City, Iowa**, where this case is the second scheduled criminal trial for that date.

IT IS SO ORDERED.

DATED this 24th day of January, 2001.

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA